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IN THE

# Supreme Court of the United States

OCTOBER TERM 1974

No. 74-1425

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WILLIAM STEINMAN,

*Petitioner,*

-v-

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

*Respondent.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

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## PETITIONER'S REPLY BRIEF

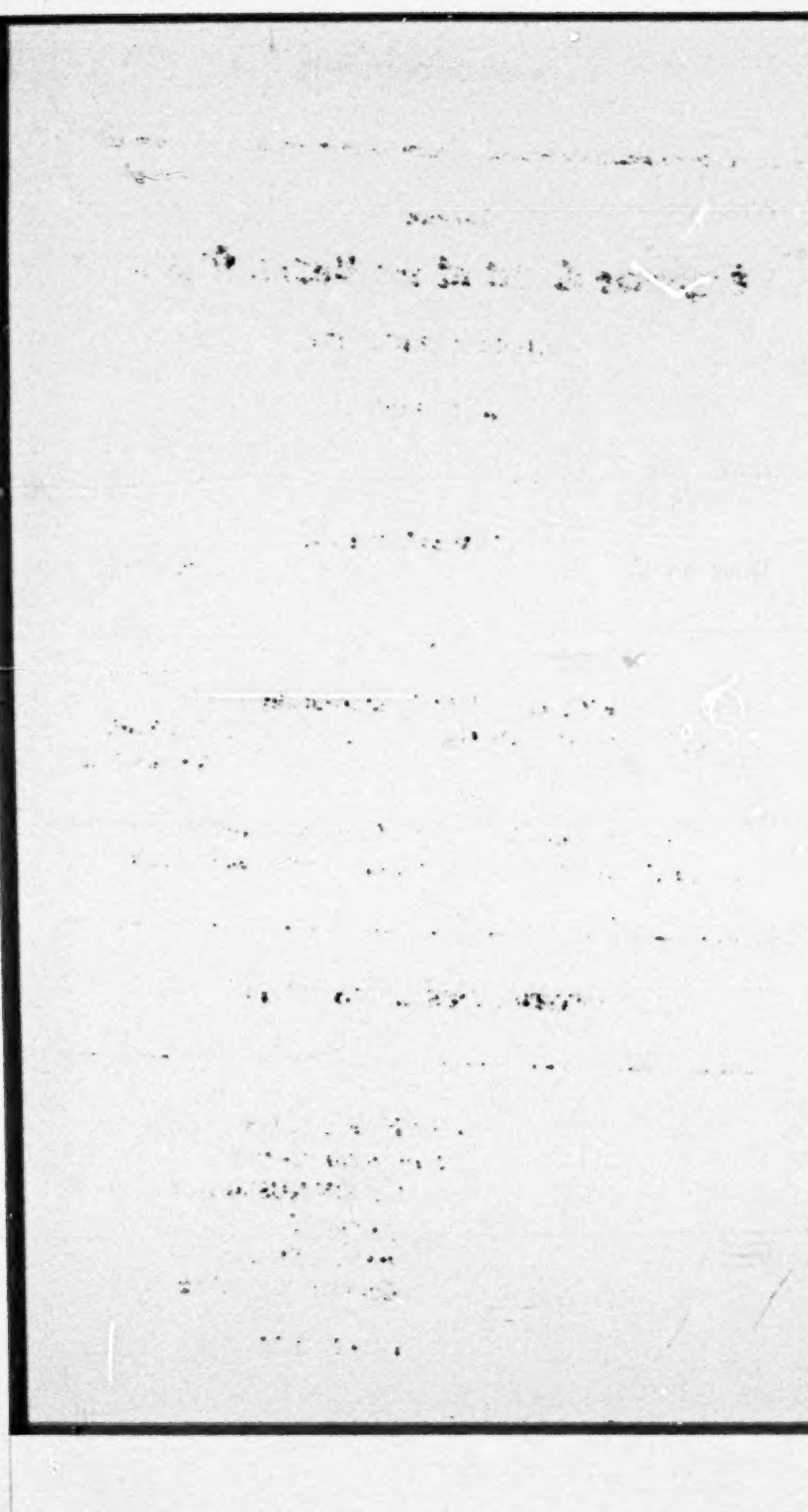
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## PETITIONER'S REPLY BRIEF

• In asserting that "petitioner has failed to indicate how the instant case is of such a unique character as to require review by this Court" (Resp. Br. p. 12), the Respondent glibly waves out of existence the core issue presented by Petitioner that he has absolutely no adequate remedy at law or meaningful access to the state courts, in view of (*a*) the facially unconstitutional statute *(Sec. 149 Judiciary Law, subd. 1)* patently violative of the independence of the judiciary and the separation of powers ordained by the Fifth and Foufteenth Amendments of the Constitution; and (*b*) the facially unconstitutional

statute (*Sec. 149 Judiciary Law subd. 2*), which seriously diminished the Petitioner's procedural rights of due process, and deprived all criminal defendants at the bar of the Extraordinary Term of the Supreme Court of the equal protection of the laws.

A statute so inherently unconstitutional uniquely meets the test of "extraordinary circumstances" laid down in *Younger v. Harris*, 401 US 37, 53-55, wherein this Court, citing *Watson v. Buck*, 313 US 387 (1941), stated:

> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

• Grossly misleading, the Respondent argues that "petitioner's further allegation that he was not, before indictment, afforded a prompt arraignment or preliminary hearing concerns a violation, if any, of state, not constitutional law" (Resp. Br. p. 21).

The fact is, rather, that Petitioner had been deliberately deprived of any arraignment whatsoever, and had been wilfully deprived of his constitutional rights of counsel and of a preliminary examination during a critical stage of the proceedings against him. (*Coleman v. Alabama*, 399 US 1; *Gerstein v. Pugh*, ——US——, Feb. 18, 1975).

To gloss over this grave constitutional transgression, as does Respondent, as "a violation, if any, of state, not constitutional law" is a bizarre contention that literally flies in the face of this Court's holding in *Coleman v. Alabama, supra*, and the fundamental constitutional tenets upon which it is grounded.

Indeed, the Respondent does not, and cannot, controvert that Petitioner had been wilfully denied his right to an arraignment and to the protection of a court and counsel without unnecessary delay following his arrest, as required by constitutional tenets of due process as well as by the strict mandate of New York law. (Petition, pp. 6-9).

In this connection, the Respondent strives to undercut Petitioner's claim, asserted in the action for a Declaratory Judgment below, that he had been held "incomunicado" for almost three months, by misleadingly representing to this Court that Petitioner was not "incarcerated in jail or physically prevented from seeing an attorney." (Resp. Br. p. 21).

Quite to the contrary, the systematic and repeated threats against Petitioner to arraign, book and fingerprint him unless he cooperated with Respondent in entrapping judges and other police sergeants, atop the repeated warnings to him not to divulge or disclose to anyone that he had been taken into custody, on threat that he would be booked, effectively held Petitioner psychologically manacled to his captor as securely as any physical restraints could have been.

The Respondent's disingenuous assertion to this Court, that "throughout that time he remained at liberty" (Resp. Br. p. 21), is of the same cloth as the self-laundered argument he had advanced in the Court of Appeals below that Petitioner had no rights of an arraignment or to a preliminary hearing because "since such rights attach only to an arrest * * * prior to indictment he was never arrested because he was neither booked nor fingerprinted." (Resp. Br. US Court of Appeals, p. 31).

Indeed, Petitioner's allegations in the action below had to be, as they were, assumed to be true by the District Court below (A-9). Thus, Respondent is forclosed from contesting the facts set forth in Petitioner's action for a declaratory judgment.

In the same vein, Respondent urges upon this Court that "the constitutional nature of Petitioner's claims is highly questionable and may in fact be 'nonexistent' * * *. Thus, the investigative techniques allegedly used may well involve only the 'nonconstitutional' defense of entrapment." (Resp. Br. p. 20).

Contrarily, given the conclusively documented prosecutorial misconduct grossly shocking to the conscience at bar, the

Respondent's argument runs directly counter to the poignant expression in *Russell v. United States*, 411 US 423, per Rehnquist, J., that the Court might "some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 US 165, 72 S.Ct. 205, 9 L.ed. 183 (1952 . . . ."

• Respondent's Brief in opposition to the petition for certiorari asserts that "the constitutional questions were clearly not substantial as to warrant the convening of a three-judge panel. * * * The Court of Appeals affirmed this decision, finding that the 'claims relating to the constitutionality of the state statutes are frivolous'." (Resp. Br. p. 20, ff.).

Our respectful submission, in answer, is two-fold:

*Firstly*, a bare reading of Mr. Justice Cardozo's learned opinion in *People ex rel. SL&T Co. v. Extraordinary Term of the Supreme Court*, 220 NY 487, and of *Matter of Reynolds v. Cropsey*, 241 NY 389 – both cases involving a construction of the very statute in issue at bar, as construed in its *pre-amended* form – conclusively attest to the grave constitutional questions propounded by the Petitioner herein.

To denigrate these issues as insubstantial or frivolous – in the face of these patently invalid statutes – is to make a mockery of the fundamental principles of the separation of powers, the independence of the judiciary and the equal protection of the laws guaranteed by the Fifth and Foufteenth Amendments of the Constitution.

In all truth, the magnitude of this twice-tainted unconstitutional statute, Sec. 149 Judiciary Law subdivisions 1 and 2, is such that it is the very source and fount of the proliferating excesses of prosecutorial misconduct polluting the rule of law for all defendants in the vise of the unconstitutional Extraordinary Term of the Supreme Court.

*Secondly*, since a *facially* unconstitutional statute may be

judicially noticed, the statute in issue was properly before the District Court and the Court of Appeals for a determination whether it afforded Petitioner meaningful access to the state court, and was inherently violative of the equal protection of the laws to which Petitioner and all others similarly situated were entitled under the Due Process Clause. (*Richardson on Evid. 10th ed., sec. 17-18, 25; Lamar v. Micov,* 114 US 218, 223; *Mills v. Green,* 159 US 651.)

• The Respondent declares that "the power of terminating the assignment and naming another justice to hold the term has not even been exercised as to this Extraordinary Term." (Resp. Br. p. 17).

The test of constitutionality, however, is not whether the independence of the judiciary has or has not been violated. The test is, rather, "by what may, by its authority, be done". (*Stuart v. Palmer,* 74 NY 183, 189; *Providence Bank v. Billings,* 29 US 514; *Vick Wo v. Hopkins,* 118 US 356, 373-4; *Watson v. Buck,* 313 US 387; *Security Trust Co. v. Lexington,* 203 US 323, 333; *Nashville, C. & St. L.Ry. v. Walters,* 294 US 405.)

The Respondent has completely side-stepped any serious attempt to rationalize the dangerously pernicious in-built potentials of *Sec. 149 Judiciary Law,* just as he has studiously ignored Petitioner's central theme that the statute in issue is facially violative of the equal protection clause of the Fourteenth Amendment. (Petition, Point II).

• The Respondent misleadingly contends that "if the judge is biased against petitioner, the latter has an adequate remedy at state law for seeking the judge's disqualification", citing N.Y. Judiciary Law Sec. 14, 22 NYCRR 33.3(c) (N.Y. Judicial Conference).

Our respectful submission, in answer, is that Sec. 14, Judiciary Law does not apply, for it provides for disqualification of a judge only in the limited situations "to which he is a party, or in which he has been attorney or counsel, or in which

he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. * * *"

Moreover, even if a motion for disqualification were to be seriously entertained, generally, there would be no other available judge to replace the single, solitary designee of the Governor to preside over the Extraordinary Term of the Supreme Court. To meet such contingency, the Governor would have to appoint a new extraordinary term and designate another Judge to preside in his place, as authorized by *Sec. 149 Judiciary Law, Subd. 1.* Manifestly, with such formidable procedural and practical hurdles, blocking any potential motion for disqualification of the single judge currently operating the Extraordinary Term of the Supreme Court in the five counties of New York City, the likelihood of advancing such a motion successfully would be relatively nil. As compared to defendants in the regular terms of the Supreme Court, this Petitioner and all others similarly situated are therefore singularly deprived of the equal protection of the laws.

• In its oral opinion, the Court of Appeals held that "the need to defend against a State criminal prosecution is not the irreparable injury which is a prerequisite to Federal intervention. See, e.g. *Younger v. Harris,* 401 US 37, 46 (1971) and *Douglas v. City of Jeannette,* 319 US 157, 164 (1943)". (SA 3-4).

Overall, the Petitioner has been irreparably injured in that he has been utterly deprived of an adequate remedy at law and of all meaningful access to the state courts (Petition, Point II).

Additionally, Petitioner has been, is being, and will be subjected to great and immediate irreparable injury by the fact that his presently precarious financial situation may inevitably force him to abandon his right to defend, and compel him to drop the multiplicitous appeals now pending in the state and federal courts on constitutional grounds for want of foreseeable financial resources. (App. U.S. Court of Appeals, p. 96).

Accordingly, this prosecution vastly transcends the mere

"cost, anxiety, and inconvenience of having to defend against a single criminal prosecution." (*Younger v. Harris*, 401 US 37, 46; *Douglas v. City of Jeannette*, 319 US 157, 164; *Watson v. Buck*, 313 US 387, 400), or the financial disarrangements caused by the "usual and customary course" of criminal prosecutions (cf. *Reed v. Littleton*, 275 NY 153, 157), grounded as it is on an extraordinary compote of extreme bad faith, harassment, scandalously shocking prosecutorial misconduct, and patent unconstitutionality of the statute purportedly creating the "court" and arm of the grand jury that produced this indictment.

Certainly, in the unprecedented situation presented at bar, a prosecutor should not be permitted to so multiply his own crimes of prosecutorial misconduct as to drown the accused in a forbidding maelstrom of protracted and costly litigation.

Petitioner's mounting counsel fees and expenses for defending the pending state prosecution against him and appealing any conviction therefrom and possible further appeals therefrom, have resulted in an enormous drain against his financial resources. He would, nevertheless, be ineligible for relief as an "indigent" person (see *Dolan Properties, Inc. v. Schoolcraft*, 75 Misc. 2d 1084; 350 NYS 2d 292, 1973).

He has barely any savings, and is now deeply in debt. In addition to the mounting litigation in the Federal proceedings at bar, a separate Declaratory Judgment action testing the constitutionality of the statute is now pending in the appellate courts, both state and federal. The Petitioner would have to commit himself further into debt in order to prosecute the enormously extensive appeals therefrom to the New York State Court of Appeals and the United States Supreme Court.

The starkly realistic alternative now facing Petitioner is the grim probability of an unjust, economically coerced and truly involuntary plea of guilty to the indictment, or to submit helplessly to any unappealed conviction, should there be any. Thus, caught in the vise of a Catch-22 situation, the Petitioner now stands in grave jeopardy of irreparable injury in the

pending State criminal proceedings against him, for which he has no meaningful remedy at law in the State courts.

In net effect, to meet this hydra-headed assault by the respondent Nadjari against Petitioner's constitutional rights, in both State and Federal forums, on the trial level, and in the appellate echelons up to the United States Supreme Court and then conceivably back again via federal habeas corpus relief, as intimated by the District Court below (A-10), would so likely enfeeble and impoverish the Petitioner into ever deeper debt, frustration and anguish as to impel him into abandoning his just fight to redress his rights altogether.

We earnestly submit that the fairly imminent danger of such eventuality, constituting great and immediate irreparable injury in the extraordinary situation at bar, should have been considered by the Courts below, especially where as here, the Respondent's own shocking misconduct is the very inducing cause of Petitioner's untenable predicament.

## CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

May 25, 1975

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